In re Estate of the Late Otieno Ogula alias Ogutu Otieno Ogula (Deceased) (Family Appeal E012 of 2025) [2025] KEHC 10483 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10483 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

FAMILY APPEAL E012 OF 2025

DK KEMEI, J

JULY 18, 2025

IN THE MATTER OF THE ESTATE OF THE LATE OTIENO OGULA ALIAS OGUTU OTIENO OGULA (DECEASED)

BETWEEN

ALICE OKITA ..... APPELLANT

AND

KEVIN OCHIENG OGUTU ..... RESPONDENT

(Being an appeal from the order of Hon. B. Limo (PM) given at Siaya on 13th May 2025 in Siaya MCSUCC/E323/2021)

RULING

1. The Appellant/Applicant herein has filed a notice of motion application dated 15th May 2025 seeking the following reliefs:

   i. Spent.

   ii. That the honorable court be pleased to grant a temporary order of stay of execution of the ruling and/or the decree of Hon. B. Limo delivered in Siaya MCSUCC/E323 of 2021 on 13th May 2025 and all the consequential orders arising therefrom pending the hearing and determination of this application interpartes.

   iii. That the Honorable court be pleased to issue a temporary order of stay of execution of the ruling and/or the decree of Hon. B. Limo delivered in Siaya MCSUCC/E323 of 2021 on 13th May 2025 and all the consequential orders arising therefrom pending the hearing and determination of the appeal lodged by the Appellant herein.

   iv That this Honorable court be pleased to issue any other order as it may deem just, appropriate and expedient in the interest of justice.

v The costs of the application be provided for.

2. The application is pivoted on the grounds enumerated on the face thereof and on further grounds in the supporting affidavit sworn by the Applicant dated 15th May 2025 wherein she averred inter alia; that a Ruling was delivered in this matter on 13th May 2025 and the trial magistrate declined to issue stay of execution pending appeal by reason that issuing stay would be akin to sitting on appeal in his own case; that the appellant aggrieved by the said decision filed an appeal to this Court challenging the decision of the trial magistrate in Succession case number E323 of 2021 between the parties herein;that the effect of the decision of the trial magistrate is that the Respondent is likely to evict the Appellant from land parcel No. Central Alego/ Nyalgunga/176 in which the Appellant stays; that if stay is not granted the appeal would be rendered nugatory;that the appeal as filed raises substantial issues with overwhelming chances of success;that the Appellant is ready to furnish security as may be directed by the Court.

3. The Respondent opposed the application and filed a replying affidavit sworn on 3/6/2025 wherein he averred inter alai; that the instant application for stay as filed is malicious, vexatious, brought in bad faith, an abuse of the court process and judicial time and totally without merits; that the Appellant is taking the court for a ride and in circles having initially filed a similar application dated 18th February 2025 in HCFA/E004/2025 where she sought inter alia an order for stay of execution against the said land parcel LR No. Central Alego/Nyalgunga/1746 which order was granted on 19th February 2025 as per annexure K.O.O-1 a & b; that the Appellant (then applicant) in HCFA/E004/2025 vide the notice of motion application dated 18th February 2025 decided to withdraw the application on 27 February 2025 when the said application came up for interpartes hearing before this court as per annexure K.O.O -2; that the current application herein amounts to a fishing expedition and an abuse of the court's process and judicial time only meant to delay the judgment holder the opportunity to enjoy the fruits of his judgment.

4. Application was canvassed by way of written submissions. At the time of writing this Ruling, only the Respondent had filed his submissions.

5. It was the Respondent's submissions that the Appellant should not hide behind Article 159(2)(d) of the *Constitution* as section 79G of the *Civil Procedure Act* is clear on filing of appeals from the subordinate courts. He relied on the case of *Jackline Wanjira Njeru v Equity Bank (kenya) Limited and another* (2020) eKLR where it was held:

> "it is settled law that court's discretion should not be exercised to assist a party that has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."

6. Learned counsel likewise placed reliance on the Supreme Court interpretation in the case of *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR where it agreed with the dicta of Kiage JA in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others* [2013] stating:

> "...I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free –for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and

determination fair, just certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even handed and dispassionate application of the rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their applications are concerned..."

The Supreme Court further emphasized that:

> "Indeed this Court has had occasion to remind litigants that Article 159(2)(d) of the *Constitution* is not a panacea for all procedural shortfalls. All that the courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159(2)(d) is applicable on a case to case basis. See *Raila Odinga and 5 Others v IEBC and 3 others*; Petition No. 5 of 2013, eKLR"

7. It was further submitted that the current application herein amounts to a fishing expedition and an abuse of the court's process and judicial time only meant to delay the judgment holder the opportunity to enjoy the fruits of his judgment.

8. That the Appellant (then applicant) in HCFA/E004/2025 vide the notice of motion application dated 18th February 2025 decided to withdraw the application on 27 February 2025 when the said application came up for interpartes hearing before Hon. Justice D.K. Kemei.

9. I have considered the application and the submissions on record. I find that the issue for determination is whether the application has merit.

10. In *Jackline Wanjira Njeru v Equity Bank (Kenya) Limited and another* (2020) eKLR where it was held:

> "it is settled law that court's discretion should not be exercised to assist a party that has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."

11. It is noted from the record that the Appellant /Applicant had already applied for similar orders vide a Notice of motion application dated 18th February 2025 in HCFA E004/2025 where an order of stay of execution was granted. However, the same Appellant/Applicant went ahead to withdraw the application when it later came up for interpartes hearing on 27th February 2025.

12. It is worth noting that judicial time is very precious and that the same should not be used by litigants to settle personal scores. Going by the actions of the Appellant in filing Siaya HCFA E004/2025 and obtaining conservatory orders, then withdrawing the suit and filing an appeal at the ELC being Siaya High Court ELC No. E004 of 2025 and then filing the present appeal and application, iam in agreement with the Respondent that the instant application seems to be aimed at delaying justice. It is clear that the Appellant/Applicant is clutching at any straw that might come her way in a bid to prevent the onslaught following the Respondent's juggernaut in seeking to enforce the orders of the trial court. It is instructive that the Appellant/Applicant has not rendered an explanation as to why she is maintaining two suits one at this court and the other at the ELC. It would appear to me that the Appellant is engaging in lottery with the courts which is unacceptable. The Appellant must decide

which forum is suitable to determine her suit. The Court of Appeal in *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] KLR 229 held as follows:

> " In our view, the often-quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time should is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of administration of justice...We approve and adopt the principles so ably expressed by both Lord Roskill and Lord Temple man in the case of *Ashmore v Corp of Lloyds* [1992] 2 ALL ER 486 at page 488 where Lord Roskill states:
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> > "It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out this duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues."
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> Flowing from the foregoing authority, the Appellant/Applicant must now be called to order as she cannot maintain two causes of action at two separate courts over the same subject matter namely a succession cause that had been lodged before the Chief Magistrate's Court at Siaya.
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> Even though the Appellant's appeal requires to be secured so that the same is not rendered nugatory, the Applicant is well aware of the mandatory provisions of Order 42 Rule 6 of the *Civil Procedure Rules* regarding the provision of security pending the determination of the pending appeal. The said Rule also provides that the Applicant must show that she stands to suffer substantial loss if the order of stay is not granted and further show that the application has been filed without undue delay. Applicant has averred that she is ready and willing to furnish security as may be directed by the court.

13. It is noted that the application herein was filed following the impugned ruling of the trial court dated 13/5/2025 and thus the Applicant moved this court within two days and hence there was no delay. As regards the aspect of substantial loss to be suffered, it is noted that the subject matter relates to distribution of land belonging to a deceased person and in which the Applicant stakes a claim thereon as a beneficiary. Indeed, land matters are quite emotive due to the intrinsic value it has both in itself but to its owners as well. Already, it has transpired that the Respondent intends to commence execution of the decree by evicting the Applicant and other relatives from the suit land and that there exists an ELC matter now pending determination. It would appear the Applicant herein has made a two-pronged move over the matter so that this appeal will deal with the orders issued by the succession court while the ELC Court will deal with the issue of eviction. The real issues are expected to emerge and which will be determined during the hearing of the pending appeal.

14. Learned counsel for the Respondent has submitted that their client is entitled to enjoy the fruits of the judgement made in his favour. Indeed, the Dcereeholder in any suit should be allowed to enjoy the fruits of a judgement. However, a party seeking to dislodge the said decree holder from the seat of judgement must be prepared to furnish security for the due performance of the decree which will be ultimately binding in the end. Learned counsel for the Respondent has proposed that the Appellant should deposit a sum of Kshs 100,000/ into court within 14 days in order to be granted the stay order

sought. It is noted that the Applicant di not file submissions in response to the Respondent's gesture. Looking at the circumstances of the case and in order to preserve the subject appeal, iam persuaded to accept the proposal by learned counsel for the Respondent that the Applicant should deposit a certain amount of money into court as security within a certain time frame as the parties adjudicate on the pending appeal.

15. In view of the foregoing observations, the Appellant's application dated 15/5/2025 is allowed in the following terms:

    a) An order of stay of execution of the ruling and decree in Siaya MCSUCC No. E323 of 2021 and all consequential orders arising therefrom is hereby granted upon the Appellant/ Applicant depositing Kshs 100, 000/ as security for the due performance of the decree pending determination of the appeal herein into court within fourteen (14) days from the date hereof failing which the stay shall lapse.

    b) The costs of the application shall abide in the appeal.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 18TH DAY OF JULY 2025.

D. KEMEI

JUDGE

In the presence of:

Okanda.....for Appellant/Applicant

Ochanyo.....for Respondent

Okumu.....Court Assistant